Employment Law

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SOUTH AFRICA

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EMPLOYMENT LAW ALERT

"Piece work" is covered by the National Minimum Wage Act

The preamble to the National Minimum Wage Act 9 of 2018 (Act) recognises the need to eradicate poverty and inequality in the national labour market. In addition, a stated purpose of the Act is to protect workers from unreasonably low wages by ensuring that they at least receive the prevailing national minimum wage (NMW).

At a high level, the Act applies to all workers, and it defines:

- a worker as any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind; and
- an employer as any person who is obliged to pay a worker for the work that the worker performs for them.

However, a person is excluded from the application of the Act if they are:

- a member of the South African National Defence Force, the National Intelligence Agency or the South African Secret Service; or
- a volunteer (namely, a person who performs work for another person but who does not receive, or is not entitled to receive, any remuneration for their services).

The NMW increased on 1 March 2025 to R28.79 for every ordinary hour worked.

What happens in the case of "*piece work*" or "*casual work*"?

The Basic Conditions of Employment Act 75 of 1997 (BCEA) provides that even where a worker works for less than four hours on any day, they must be paid for four hours' work on that day if they earn below R254,371.67 annually (which is the current earnings threshold determined by the Minister of Employment and Labour).

The outcome in the CCMA arbitration in *Siphokazi Mvambi and 4 Others v Crown Household (Pty) Ltd (GAEK10115-23)* is a recent example of the consequences which an employer would face where the employer attempts to circumvent the Act and pay workers below the NMW.

In this matter, the workers referred a dispute to the CCMA for outstanding remuneration under their contracts of employment, the Act and the BCEA. The workers were employed as general workers by Crown Household on permanent contracts and earned a salary of R200 per day.

Until March 2021, the workers were paid in terms of the Act. However, from April 2021 onwards, the workers were informed that they would be paid in terms of a "*box system*". This meant that the calculation of their earnings would be based on the number of boxes they processed each day and daily targets were set that the workers had to meet to earn their salary for the month. The working hours were from 07h00 to 16h30, Monday to Friday and some Saturdays, for which they were not paid. They would also at times be required to perform extra duties (such as cleaning and offloading trucks) that prevented them from reaching the daily targets set by

"Piece work" is covered by the National Minimum Wage Act

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the employer. The workers also did not have lunch or tea breaks provided for in their employment contracts. The employer also implemented an annual shutdown from 22 December to 10 January each year, which period would be regarded as annual leave despite workers not being remunerated for that period.

The CCMA Commissioner found that the employer failed to comply with the Act and the BCEA and ordered it to pay the applicants their outstanding statutory monies as calculated in terms of the arbitration award (award). The calculation of the amounts owing to the applicants included the remuneration that they did not receive for the annual shutdown period (i.e. their annual leave payments) and for working on Saturdays. The employer was ordered to pay R137,000 to the workers.

The employer sought to challenge the Award in the Labour Court on technical points and the matter was initially set down on the urgent roll but not heard by the court. Regrettably, the Labour Court did not get into the merits of the matter. The employer was also ordered to pay the costs of the urgent application. The Labour Court may, however, consider the merits of the matter in the fullness of time.

Key takeaways

Employers are reminded that prior to the 2024 Labour Appeal Court decision in *Quantum Foods v Commissioner H Jacobs N.O. and Others [2024] 1 BLLR 32 (LAC)*, there was much uncertainty about what is included in the calculation of wages. The uncertainty related to whether a contractual bonus and retirement fund contribution were considered gratuities or fell within the exclusions contained in the Act. This confusion was clarified by the Labour Appeal Court, which also meant that *"structuring"* of the wage within legal parameters is possible.

The award in *Crown Household* on the other hand presents a cautionary tale for employers – that creative approaches to getting around the legal obligation to pay workers the NMW will not curry favour with the CCMA. It is therefore best to take advice on *"structuring"* a wage to determine its legal permissibility.

Imraan Mahomed and Lee Masuku

EMPLOYMENT LAW ALERT

Does being (falsely) accused of racism amount to unfair discrimination?

Section 6 of the Employment Equity Act 55 of 1998 (EEA) prohibits unfair discrimination and provides that harassment of an employee is a form of unfair discrimination.

In *Solidarity obo C Kellerman v Western Cape Education Department and Others* [2024] ZALCCT 59 (22 November 2024) the Labour Court had to consider whether an employee who was falsely accused of racism was in fact subjected to unfair discrimination as prohibited by the EEA.

Factual background

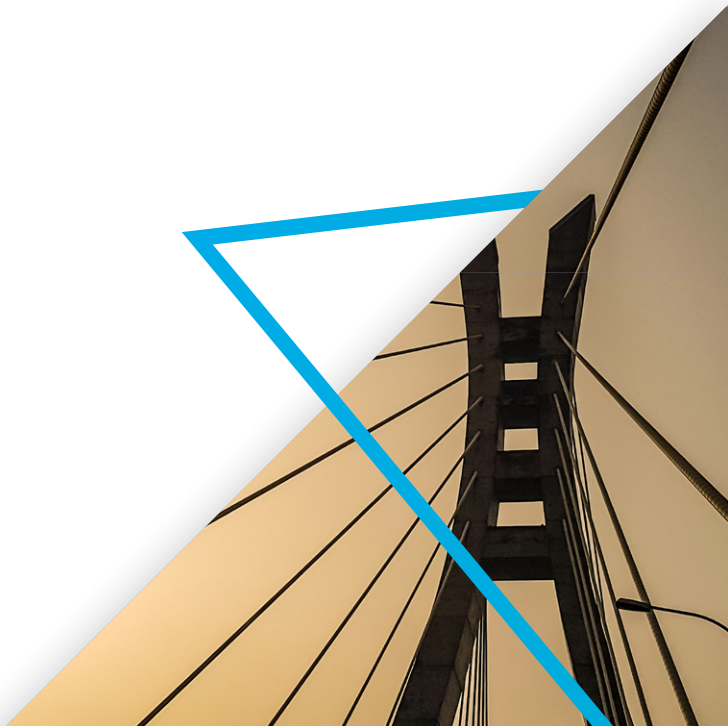
The employee was accused of being racist by one of his subordinates. The Western Cape Education Department (Department) convened a disciplinary enquiry to test the veracity of these allegations. An independent chairperson concluded that the allegations of racism did not have any merit and, consequently, no action was taken against the employee for the allegations of racism.

The employee, however, was dissatisfied with the Department's conduct and proceeded to refer a claim in terms of section 6(1) and 6(3) of the EEA on the basis that he had been harassed and thus unfairly discriminated against. Furthermore, the employee sought to hold the Department vicariously liable for the harassment in terms of section 60 of the EEA for failing to take reasonable steps to eliminate the alleged harassment.

The court's findings

At the onset, the court identified difficulties with the manner in which the employee's case was pleaded and enquired what the **exact** ground of discrimination was as it was not readily apparent from the employee's statement of claim. Furthermore, the court noted that the employee did not plead that he was unfairly discriminated against based on listed grounds i.e. that he was accused of being racist by a subordinate because he was a white male (with the listed grounds being race and gender in this example).

Ultimately, the employee's failure to plead his case with sufficient particularity proved to be fatal as the court upheld the Department's application for absolution from the instance.



Does being (falsely) accused of racism amount to unfair discrimination?

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Key takeaways

The court considered the principles governing applications for absolution from an instance and confirmed that the test was, in essence, whether the employee had at least produced sufficient evidence to reasonably establish the *prima facie* existence of discrimination in the form of harassment on an unlisted arbitrary ground.

The court considered the employee's testimony, along with undisputed documentary evidence, and concluded that on the employee's own version, he had failed to reasonably establish a *prima facie* case of discrimination on an unlisted ground and granted the Department absolution from the instance, which effectively meant the end of the employee's case.

The court further made the point that "*not everything bad, inexplicable or irrational that may happen to an employee is always discrimination*" and confirmed that in order to succeed in a unfair discrimination claim on the basis of harassment, a claimant is required to establish a direct nexus or link between the conduct which is complained of and the grounds listed in section 6(1) of the EEA, or the personal attributes or characteristics of the individual. Put differently, the fact that an employee suffers an "*unpleasant*" event in the workplace does not necessarily mean that they have been subjected to harassment (as a form of unfair discrimination) as the court will apply an objective test to determine whether the provisions of section 6 of the EEA have been contravened.

Anli Bezuidenhout, Thato Maruapula and Azola Ndongeni

EMPLOYMENT LAW ALERT

New earnings threshold effective 1 April 2025

As of 1 April 2025, South Africans will see the implementation of the increased earnings threshold, determined by the Minister of Employment and Labour, in the amount of R261,748.45. This represents an increase of R7,376.78 from the previous amount of R254,371.67, which has been in effect since 1 April 2024.

The earnings threshold impacts the application of provisions of the Basic Conditions of Employment Act 75 of 1997 (BCEA), the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EEA).

In terms of the BCEA, employees earning more than the earnings threshold are excluded from the provisions, which regulate ordinary hours of work, overtime, compressed working weeks, averaging of hours of work, meal intervals, daily and weekly rest periods, Sunday pay, pay for night work and pay for work on public holidays.

With regards to the LRA, employees earning more than the earnings threshold are not subject to the deeming provision in accordance with which employees engaged by a temporary employment service or labour broker who is not performing a temporary service are deemed to be employees of the client for purposes of the LRA. In addition, employees earning in excess of the earnings threshold fall outside the scope of the provisions relating to fixed-term employees who are deemed to be employed indefinitely after three months (in the absence of justifiable reasons for fixing the term of the contract).

Looking at the EEA, an employee earning in excess of the earnings threshold who has a dispute under Chapter II of the EEA relating to unfair discrimination, is not permitted to refer the dispute to the Commission for Conciliation, Mediation and Arbitration for arbitration (unless the dispute relates to alleged unfair discrimination on the grounds of sexual harassment, or the parties all agree to arbitration) and is obliged to refer the dispute to the Labour Court for adjudication.

For purposes of determining whether an employee earns in excess of the earnings threshold, *"earnings"* means an employee's regular annual remuneration before the deduction of income tax, pension fund contributions, medical aid contributions and similar payments, but excludes similar payments or contributions made by the employer in respect of the employee. This is subject to the proviso that subsistence and transport allowances received, achievement awards and payments for overtime worked do not fall within the scope of remuneration.

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